MOTI FILED
JAN 2 1 1999

(3)

No. 98-1003

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GERALD GIRRES, *et al.*,
Petitioners,
v.
CLARENCE BORMANN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

MOTION FOR LEAVE TO FILE BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., KANSAS FARM BUREAU,

(Additional *Amici Curiae* Listed on Inside Cover)

JOHN A. MACLEOD
Counsel of Record
STEVEN P. QUARLES
ELLEN B. STEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

29pp

MINNESOTA FARM BUREAU FEDERATION, MISSOURI FARM BUREAU FEDERATION, NEBRASKA FARM BUREAU FEDERATION, NEW MEXICO FARM & LIVESTOCK BUREAU, OHIO FARM BUREAU FEDERATION, INC., PENNSYLVANIA FARM BUREAU, TENNESSEE FARM BUREAU FEDERATION, TEXAS FARM BUREAU, UTAH FARM BUREAU FEDERATION, IOWA POULTRY ASSOCIATION, OHIO POULTRY ASSOCIATION, NEBRASKA POULTRY INDUSTRIES, INC., SOUTH DAKOTA POULTRY INDUSTRIES ASSOCIATION, IOWA AGRIBUSINESS ASSOCIATION, IOWA CORN GROWERS ASSOCIATION, IOWA CATTLEMEN'S ASSOCIATION, IOWA DAIRY PRODUCTS ASSOCIATION, IOWA INSTITUTE FOR COOPERATIVES, IOWA PORK PRODUCERS ASSOCIATION, IOWA SOYBEAN ASSOCIATION, AND IOWA TURKEY FEDERATION IN SUPPORT OF THE PETITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1003

GERALD GIRRES, *et al.*,

Petitioners,

v.

CLARENCE BORMANN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

---

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the Petition. Petitioners have consented to the filing of this brief and their letter has been filed with the Clerk. Respondents have not consented, necessitating this Motion.

All 50 States have statutes that provide a qualified defense to nuisance liability that may arise from agricultural operations. Known as "right-to-farm" laws, these statutes

have been enacted by the state legislatures to encourage farming and decrease the rate at which land available for agricultural uses is diminishing. In this case, the Iowa Supreme Court has held that the mere enactment of such a qualified nuisance defense is sufficient to constitute a *per se* taking under the Fifth and Fourteenth Amendments. Under the Iowa court's reasoning, the right-to-farm laws of all 50 States stand to be invalidated.

Amici are national and state-wide associations representing agricultural producers who rely on and benefit from right-to-farm laws and who are therefore vitally interested in the question presented by the Petition. Unless the Petition is granted and the decision of the Iowa court is corrected, *amici's* members in Iowa who have established "agricultural areas," committing their lands to agricultural use, will lose the limited nuisance defense that was the *quid pro quo* for so dedicating their property. They therefore face the immediate prospect of increased nuisance litigation and potential liability.

Beyond Iowa, *amici's* members nationwide also face immediate uncertainty over the validity and permanence of the statutory qualified nuisance defenses upon which they have relied for years. Regardless of whether the Iowa court's reasoning is followed by other courts, unless that court's decision is corrected, a wave of Fifth Amendment challenges to right-to-farm laws (and potentially to other land use restrictions implicated by the reasoning of the court) is certain to come. This impending litigation alone undermines the relative stability and security from nuisance suits that right-to-farm laws have provided American agriculture for most of the past two decades.

The Petition presents strong arguments as to the importance of the constitutional question presented here and the inconsistency between the Iowa court's decision and this Court's Fifth Amendment jurisprudence. *Amici* wish to

supplement these arguments (¶ 1), but also to emphasize: the far-reaching implications of the decision below for numerous other relatively modest land use restrictions beyond right-to-farm laws (¶ 2); the improvidence of establishing a new category of *per se* takings that would exclude any consideration of the legislature's purposes in the context of Fifth Amendment challenges to land use restrictions (¶ 3); the need to correct the Iowa court's departure from this Court's high standard for facial challenges (¶ 4); and the importance of granting certiorari to protect laws enacted by 50 state legislatures in the battle to preserve America's farmland (¶ 5).

Respectfully submitted,

JOHN A. MACLEOD
Counsel of Record
STEVEN P. QUARLES
ELLEN B. STEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Amici Curiae

January 21, 1999

QUESTION PRESENTED

Are "right-to-farm" laws — enacted by all 50 States — facially unconstitutional as a *per se* taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	PAGE
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

ABN 51st St. Partners v. City of New York, 724 F. Supp. 1142 (S.D.N.Y. 1989) 8

Agins v. City of Tiburon, 447 U.S. 255 (1980) 14

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995) 15

Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) 8

TABLE OF AUTHORITIES — Continued

PAGE

Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987)..... 10

Gibbs v. Southeastern Inv. Corp., 705 F. Supp. 738 (D. Conn. 1989)..... 8

Griggs v. Allegheny County, 369 U.S. 84 (1962)..... 9

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 19

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 479 (1987)..... 14, 16

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)..... 5, 7, 16

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... 9

Miller v. Schoene, 276 U.S. 272 (1928)..... 13

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)..... 6-7, 15-16

Penn Central Transp. Co. v. New York City 438 U.S. 104 (1978)..... 10-11, 19

TABLE OF AUTHORITIES — Continued

	PAGE
Pennell v. City of San Jose, 485 U.S. 1 (1988)	14
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	9, 10
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922)	9
Richards v. Washington Terminal Co., 233 U.S. 546 (1914)	9, 16
Seniors Civil Liberties Ass'n, Inc. v. Kemp, 761 F. Supp. 1528 (M.D. Fla. 1991)	8
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)	14
United States v. Causby, 328 U.S. 256 (1946)	9, 16
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	11, 12
Yee v. City of Escondido, Cal., 503 U.S. 519 (1992)	5, 7-8, 10

TABLE OF AUTHORITIES — Continued

PAGE

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V ..... passim
U.S. Const. Amend. XIV 3, 4

STATUTES

Iowa Code § 352.1 16-17
Iowa Code § 352.6 2-3
Iowa Code § 352.9 3
Iowa Code § 352.11 ..... 3, 4, 17, 18
N.C. Gen. Stat. § 106-700 18

OTHER AUTHORITIES

Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. Pitt. L. Rev. 289 (1984) 18

Robert Meltz, *et al.*, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation*, (Island Press 1999) 9-10, 14-15

National Agricultural Lands Study, Final Report (1981) 17, 19

TABLE OF AUTHORITIES — Continued

PAGE

Preserving America's Farmland – a Goal the Federal Government Should Support, Report to the Congress by the Comptroller General of the United States (Sept. 20, 1979) 17

William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207 (1967) 9

AMICUS CURIAE BRIEF OF THE NATIONAL PORK PRODUCERS COUNCIL, IOWA FARM BUREAU FEDERATION, COLORADO FARM BUREAU, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU, INC., KANSAS FARM BUREAU, MINNESOTA FARM BUREAU FEDERATION, MISSOURI FARM BUREAU FEDERATION, NEBRASKA FARM BUREAU FEDERATION, NEW MEXICO FARM & LIVESTOCK BUREAU, OHIO FARM BUREAU FEDERATION, INC., PENNSYLVANIA FARM BUREAU, TENNESSEE FARM BUREAU FEDERATION, TEXAS FARM BUREAU, UTAH FARM BUREAU FEDERATION, IOWA POULTRY ASSOCIATION, OHIO POULTRY ASSOCIATION, NEBRASKA POULTRY INDUSTRIES, INC., SOUTH DAKOTA POULTRY INDUSTRIES ASSOCIATION, IOWA AGRIBUSINESS ASSOCIATION, IOWA CORN GROWERS ASSOCIATION, IOWA CATTLEMEN'S ASSOCIATION, IOWA DAIRY PRODUCTS ASSOCIATION, IOWA INSTITUTE FOR COOPERATIVES, IOWA SOYBEAN ASSOCIATION, AND IOWA TURKEY FEDERATION IN SUPPORT OF THE PETITION

INTEREST OF *AMICI CURIAE*[*]

The interest of *amici curiae* in this matter is detailed in the preceding Motion for Leave to File Brief *Amicus Curiae* and, in the interest of reducing the burden on the Court, will not be restated but is incorporated herein.

---

[*] Pursuant to Rule 37.6, counsel of record states that no part of this brief has been authored by counsel for either party. In addition, no one other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case, adding the following points of emphasis.

1. In contrast to the vast majority of land use laws and regulations in today's regulatory state, the 50 "right-to-farm" statutes that would be invalidated under the reasoning of the Iowa Supreme Court do not restrict the uses to be made of private property. Rather, these laws protect the ability of farmers to use their land for agricultural production by providing a qualified defense to nuisance liability for normal farming activities. Fifty state legislatures have seen fit to provide this limited nuisance liability protection in order to decelerate the loss of this nation's irreplaceable agricultural land base, and to provide a measure of certainty where lawful but sometimes incompatible land uses — such as agriculture and residential development — collide. The Iowa Supreme Court's decision ignored this legitimate determination, made independently by each of the 50 States. Indeed, by declaring Iowa's law facially invalid as a *per se* physical taking of property under the Fifth and Fourteenth Amendments, the Iowa court put any examination of the legislative policy off limits. Importantly, the Iowa court reached this result based on a misapprehension of several older rulings of this Court, while disregarding this Court's modern takings jurisprudence.

2. The Iowa statute declared invalid in this case provides owners of designated "agricultural areas" with a qualified defense to nuisance suits by their neighbors. Agricultural areas are designated as such upon application of the land owners and approval by a county Board of Supervisors after notice and a public hearing. Iowa Code § 352.6. Agricultural areas may not be designated within the corporate limits of a city, must encompass at least 300 acres,

and must be restricted to predominantly agricultural use. *Id.* In exchange for so limiting the use of their lands, the owners of agricultural areas receive the qualified nuisance defense. [1]

3. Iowa's nuisance defense is carefully limited. It is *not* available if a nuisance results from a farm operation that violates *any* federal or state statute or regulation. Iowa Code § 352.11(1)(b). It is *not* available if a nuisance results from the negligent operation of a farm. *Id.* It does *not* apply where the injury or damage was caused by a farm operation before the designation of the agricultural area, or where the injury or damage is caused by the pollution of any stream, the overflowing of another's land, or excessive soil erosion onto another's land. *Id.* Perhaps most importantly, for purposes of considering the Iowa court's decision, the defense does *not* apply to claims for trespass. The statute therefore does *not* authorize or legitimize the physical invasion or occupation of any third party's land.

4. Respondents are Petitioners' neighbors, who claim that the designation of Petitioners' land as an "agricultural area" constitutes a *per se* "physical" taking of Respondents' property under the Fifth and Fourteenth Amendments. Respondents argued below that the statutory nuisance defense creates an "easement" that affects their land by enabling Petitioners to engage in farming operations that might otherwise be considered a nuisance to neighbors such as Respondents. Respondents have *not* alleged that any nuisance exists on Petitioners' property, have *not* alleged any impact on the use and enjoyment of their land, and have *not*

---

[1] Owners may apply to withdraw their land from an agricultural area after 3 years, and may withdraw the land upon notice to the county board after 6 years. Iowa Code § 352.9.

alleged any diminution of the value of their land. Therefore the only issue before the court below was whether the mere designation of an agricultural area — in the absence of any actual nuisance — violates the Fifth and Fourteenth Amendments.[2] The court concluded that it did.

REASONS FOR GRANTING THE WRIT

The Iowa court's novel and expansive view of the category of *per se* physical takings of property should be corrected. The court's decision would deprive more than 100,000 farms in Iowa, comprising the State's leading industry, of a critically important legislatively created protection — the assurance that, if they operate in a lawful and non-negligent manner, they will not risk being put out of business simply because they look and sound and smell like farms. The decision also calls into question 49 other state statutes, enacted with the same important legislative goals of preserving farmland and resolving land use conflicts, and will foster litigation in 49 States until this Court resolves the constitutional issue. The Iowa court's new definition of *per se* physical takings does nothing less than eliminate all consideration of these legislative purposes in favor of a "bright line" that is drawn far beyond any reasonable conception of the "physical" taking of property.

---

[2] Respondents alleged that the county board's designation of the agricultural area was the act that effected a taking of their property, but presented a challenge to Iowa Code Section 352.11 (the qualified nuisance defense) in its entirety. The Iowa court agreed that the area designation was the act that accomplished a taking, because it "triggered" the nuisance defense of Section 352.11. *See* App. 23a-24a. The court declared Section 352.11 facially invalid, rather than declaring the area designation invalid, presumably because Section 352.11 is "triggered" every time an agricultural area is designated.

As we demonstrate below, this Court should grant certiorari to resolve a substantial conflict between the Iowa court's decision and this Court's Fifth Amendment takings jurisprudence. During the past two decades, in particular, this Court has taken great care to limit and clarify the categories of *per se* takings, so that all but the clearest cases would be subject to detailed factual inquiry. The Iowa court's decision would dramatically expand those categories by making any restriction that can be deemed an "easement" — regardless of whether it authorizes any physical entry onto property — a *per se* taking. That decision, if allowed to stand, would adversely affect hundreds of thousands of our nation's farmers and, potentially, millions of other Americans who are subject to land use regulation. It would override the legislative judgment of all of our States. And it would do so on the basis of a facial challenge, uninformed by any evidence regarding the Iowa statute's ability to accommodate whatever complaint Respondents might have had or whatever injury, if any, Respondents might have suffered.

1. The writ should be granted because the Iowa Supreme Court has resolved important issues of federal constitutional law in a way that conflicts with this Court's precedents. *See* S. Ct. Rule 10(c); Pet . at 7-8, 26. More particularly, the Iowa court's expansive view of the category of physical takings that *per se* violate the Fifth Amendment contradicts this Court's decisions in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), and other cases concerning "physical" takings of property. *See* Pet. at 15-24.

Under the analysis of the Iowa court, any government action establishing a restriction or right that can be characterized as an "easement" will be deemed a *per se* "physical" taking — regardless of whether that "easement"

authorizes actual physical entry upon the property of the claimant. The court reasoned that an "easement" was created by the Iowa right-to-farm law's limited nuisance defense, because the defense enables farming operations to engage in activities on their own land that might otherwise constitute nontrespassory nuisances enjoinable by neighboring landowners such as Respondents. Thus, according to the court's analysis, a "physical" *per se* taking resulted from the creation of a right to maintain an admittedly "*nontrespassory invasion*[]" of property. App. 16a.

There is good reason to doubt that the statutory modification of common law nuisance defenses at issue here constitutes an "easement." Even if it does, however, there is nothing in this Court's precedents that supports the Iowa court's determination that *nonphysical* "easements" – merely by reason of being labeled easements – are *physical per se* takings. Simply put, no "physical" taking is accomplished by the Iowa statute because no "physical" entry upon property has occurred or been authorized.

The "easement" that the Iowa court deemed to exist consists of the "right" of Respondents' neighboring landowners to conduct lawful, non-negligent, non-trespassory farming operations, which — by the very nature of farming — may create noises or odors that could rise to the level of a common law nuisance. In order to encourage farming, the statute eliminates tort liability for the normal and natural consequences of such farming operations. It does not authorize physical entry onto Respondents' property. Thus, even if the creation of a limited nuisance defense could properly be deemed an "easement," it would not satisfy this Court's understanding of a physical taking. *Cf. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (taking occurs when government requires an

uncompensated "classic right-of-way easement" allowing individuals "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed").[3]

In contrast to the Iowa statute's creation of a narrow limitation on Respondents' potential future nontrespassory nuisance claims, a *per se* physical taking as defined by this Court involves physical entry onto property. Thus, in *Loretto*, 458 U.S. at 438, the *per se* physical taking involved a New York law that had authorized the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *See also Nollan*, 483 U.S. at 832 (right-of-way easement allowing continuous passage over real property).

Indeed, in *Yee*, 503 U.S. at 519, the Court rebuffed a strikingly similar attempt by property owners to characterize the regulation of their property's use as a "physical" *per se* taking. In that case, a group of landlords alleged that the combined effect of a city ordinance and a California statute was to transfer from the landlords to certain tenants "a discrete interest in land — the right to occupy the [landlord's] land indefinitely at a submarket rent." *Id.* at 527. This Court rejected the landlords' characterization of the "interest in land" taken from them as a "physical" taking, instead holding that "the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating

---

[3] *Nollan* thus does not support the Iowa court's decision, although it is the single post-1960s decision of this Court cited in support of the Iowa court's "nontrespassory" physical invasion theory. *See* App. 15a-19a.

the relationship between landlord and tenant." *Id.* at 528 (emphasis in original).[4]

Acknowledging that the regulation of land use can benefit some people at the expense of others, the Court noted that "[t]raditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise." 503 U.S. at 529-30. Such incidental economic effects, however, "do[] not convert regulation into physical invasion." *Id.* The Iowa statute presents no occasion to alter that principle.[5]

As the Petition recites (at 19-20), the Iowa court reached its decision based on a misapprehension of several older decisions of this Court. Three of those decisions involved physical intrusions into the "immediate reaches" directly

---

[4] Lower federal courts also have rejected attempts to equate regulatory restrictions with physical takings. *See, e.g., Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (rejecting contention that mandatory transfer of funds amounts to physical taking of money); *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 761 F. Supp. 1528, 1559 (M.D. Fla. 1991) (law prohibiting housing discrimination on basis of familial status did not amount to physical taking by affecting plaintiffs' "right to exclude" children from their age-restricted communities); *Gibbs v. Southeastern Inv. Corp.*, 705 F. Supp. 738, 742-44 (D. Conn. 1989) (legislation allowing eviction of tenants only for cause does not authorize "permanent physical occupation"); *ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142, 1153 (S.D.N.Y. 1989) (ordinance forcing choice between refraining from renovations on property or reserving 28 percent of floor space for low income tenants is not physical *per se* taking).

[5] Respondents, of course, have not alleged any current economic or other injury, relying exclusively on the physical taking theory.

above private property, over which the landowner was deemed to have exclusive control. *United States v. Causby*, 328 U.S. 256, 264 (1946); *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 (1962); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922). The cases thus concern "physical" takings in a very real sense, in that private airspace was physically invaded.[6] They do not support expansion of the *per se* physical category to include "non-physical" invasions.

The remaining decisions of this Court relied on by the Iowa court are also inapposite. Citing a 32-year old law review article, the Iowa court concluded that an 85-year old decision of this Court, *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), "entirely does away with the requirement of a physical taking or touching." App. 19a (quoting William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 220 (1967)). That may well be true as to takings generally; however, *Richards* was not decided as a "physical" takings case.[7] Nor was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which, despite the Iowa court's reliance on it, is generally viewed as this Court's first explicit recognition that a "mere use restriction ... *in the absence of physical occupation* or appropriation" can amount to a Fifth Amendment taking. Robert Meltz, *et al.*, *The Takings Issue: Constitutional Limits on Land Use Control*

---

[6] These decisions also involved, however, activity so disruptive that it had rendered private property essentially uninhabitable; so the cases could be deemed *per se* takings today either as physical takings or as "deprivation of economically viable use." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[7] Instead, the taking found in *Richards* involved deprivation of use and depreciation in the value of property. 233 U.S. at 556.

and Environmental Regulation (Island Press 1999) at 15 (emphasis added).

Disregarding the requirement in this Court's modern Fifth Amendment jurisprudence that *per se* physical takings involve *physical* invasions — indeed, without citation to two post-*Loretto* decisions emphasizing the narrow nature of the category of *per se* physical takings, *Yee*, 503 U.S. at 529-30, and *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245 (1987) — the Iowa court has drastically expanded the *per se* taking category to invalidate any government action that can be said to establish a non-physical "easement" affecting property without compensation. The court's novel analysis is squarely in conflict with this Court's precedents and should be corrected.

2. The Iowa court's decision should also be reviewed because the new category of *per se* takings that it creates has no stopping point. Under the court's construct, the limited nuisance defense "creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement)," and an easement is a constitutionally protected property interest that constitutes a *per se* taking of the "physical invasion" category. App. 13a-15a, 24a. An "easement" thus exists, according to the court, whenever property is burdened for the benefit of someone other than the owner of the property. *See* App. 12a-13a.

This Court long ago recognized that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal,* 260 U.S. at 413. Accordingly, a "taking" is not readily found just because "interference [with property] arises from some public program adjusting the benefits and burdens of

economic life to promote the common good." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Not surprisingly, therefore, this Court has upheld the constitutionality of any number of laws that "interfere with property" in the public interest, including, for example, municipal zoning ordinances. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Yet there can be no question that zoning, by its nature and to achieve its purposes, burdens some property for the benefit of others, and thus may be said to establish "easements" under the Iowa court's analysis.[8]

It may well be correct, in some broad and metaphysical sense, to characterize every burden on property for the benefit of another as an "easement." But the consequence of such a characterization cannot be, in our modern regulatory state, to make each such burden a *per se* physical taking. That simply goes too far and would create a combination of economic burden and regulatory paralysis beyond the nation's ability to accommodate or manage. The right-to-farm laws that substantially replicate Iowa's law thus would only be the first wave of casualties. This Court should

---

[8] Thus, either of two absurd results is driven by the reasoning of the Iowa court. First, zoning and other moderate land use restrictions, which have traditionally been upheld as appropriate adjustments of property rights that do not rise to the level of Fifth Amendment takings, now may be deemed facially invalid as "physical" takings of "easements." Alternatively, if zoning restrictions were deemed somehow different, legislatures seeking to protect agricultural land uses might choose to zone areas exclusively for agricultural use, thereby prohibiting all non-farm residences, to achieve their objectives without incurring takings liability. The perverse result, of course, would be the use of a *more* restrictive measure than the qualified nuisance defense.

exercise its discretion to consider and correct the Iowa court's decision.

3. Nor should this Court allow the Iowa decision to serve as precedent for eliminating from the takings analysis any consideration of the legitimacy of the legislature's purpose. The Iowa court simply assumed, with no evidence whatever, that (a) Respondents would be burdened if they could not sue their neighbors for the "nuisance" aspects of lawful, non-negligent and non-trespassory farming, and that (b) such burden, as an "easement," is a *per se* compensable taking — even though that "burden" may do no more than preserve the nature of the community in which the parties live.

Yet, one expects farming in a farming community. As this Court has recognized, zoning laws — like nuisances — are not absolute, but must be evaluated in context. Thus,

> the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like *the question whether a particular thing is a nuisance, is to be determined*, not by an abstract consideration of the building or of the thing considered apart, but *by considering it in connection with the circumstances and the locality. . . . . A nuisance may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.*

Village of Euclid, 272 U.S. at 388 (emphasis added). The Iowa statute that was invalidated below merely sought to preserve the State's agricultural base, by declaring that lawful, non-negligent, and non-trespassory farming — in Iowa, and subject to the requirements for establishing an agricultural area — is *not* a nuisance. This is no more

surprising and no less lawful than ordinances that prohibit maintaining farm animals in urban areas.

The Iowa court's decision puts these principles at risk, even though this Court has held that a "state does not exceed its constitutional powers for deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (denying a "taking" claim for the value of trees ordered cut down by a state entomologist, acting under state law, to prevent infection in those trees from spreading to nearby apple orchards, in a State where the apple industry was of great importance). The agrarian zoning effected by the Iowa legislature in providing the limited nuisance defense was a proper exercise of its legislative power, in that it merely defined where pigs in the barnyard prevail over the "parlors" of rural neighbors and encroaching development.

Review and correction of the Iowa court's decision is important to preserve the courts' responsibility in the land use regulation context to balance the state interests served by legislation against the burden imposed. It is important, as well, to safeguard against the possible chilling effect that the Iowa decision may have on state legislatures by causing them to fear the effect on their coffers of this sort of sound and well-intentioned legislative determination.

4. The Iowa court's variance from the teachings of this Court as to the standard for facial challenges should be corrected. The court acknowledged that it considered the case as a facial challenge to the Iowa statute and that Respondents "presented neither allegations nor proof of nuisance." App. 5a-6a. The Petition advances strong arguments (at 8-14) why the case was premature and should not have been decided in the absence of a concrete factual

setting. *Amici* share Petitioners' concerns about the lack of any evidentiary record and offer an additional reason why the Iowa court's treatment — in the face of that record — warrants review by this Court.

Not very long ago, this Court had occasion to observe that "'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle'" because they must show that "mere enactment" effects a taking. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997). *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (petitioners "face an uphill battle in making a facial attack on the Act as a taking"). *Amici* believe that the Iowa court should have rejected Respondents' facial challenge on its merits, because neither the "mere enactment" of the Iowa right-to-farm law nor the "mere designation" of an agricultural area near Respondents' land authorized a physical invasion or occupation of Respondents' or anyone else's property. Since Respondents made no attempt to argue that the statute fails to "advance legitimate state interests" or denies Respondents "economically viable use" of their land, so as to otherwise constitute a taking, *see Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), their challenge to the Iowa statute should have been rejected.[9]

---

[9] If Respondents had alleged denial of the use of their property as a result of the potential nuisance defense, then that claim would likely be premature in the context of a facial challenge. It would be impossible to know the full impact on Respondents' use of their land in advance of any actual nuisance occurring, or any attempt by Petitioners to assert the defense. *See Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., dissenting) (noting even greater difficulty of establishing denial of economically viable use in facial challenge); Robert Meltz, *et al.*, *The Takings Issue: Constitutional*

(continued....)

The Iowa case well illustrates the need for the "uphill battle" standard that this Court requires for facial challenges. In the posture in which it considered the case, the Iowa court did not know what nuisance, if any, was actually being visited upon the Respondents, or what impact that hypothetical nuisance was having on the Respondents' use and enjoyment of their land. The court could not evaluate whether and to what extent that hypothetical nuisance was the result of negligence, or some noncompliance with any one of the myriad federal and state laws that regulate land use, air quality, water quality, dust, noise, and odor. Those are important considerations, for if the hypothetical nuisance *did* result from any of those factors, or if it involved water pollution or flooding or some other excluded event, the Respondents' suit for their hypothetical nuisance was not barred by the Iowa statute. In short, the Iowa court was not in a position, on the record before it, to evaluate how great was the restriction on the Respondents' ability to sue, or indeed whether any real world restriction even existed. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (successful facial challenge to a regulation requires showing that the regulation cannot operate properly in any circumstance.)

Without any record, this case is in no respect like the cases that the Iowa court relied on to reach its decision. *See, e.g., Nollan*, 483 U.S. at 832 ("individuals are given a permanent and continuous right to pass to and fro so that the

---

(continued) . . .

Limits on Land Use Control and Environmental Regulation (Island Press 1999) (noting extreme difficulty of establishing economic injury in facial challenge, whereas other grounds requiring less factual development may be provable "on the face of the law").

real property may continuously be traversed); *Causby*, 328 U.S. at 259 (the "result [of the low overflights] was the destruction of the use of the property as a commercial chicken farm. . . . On the basis of these facts, [the Court of Claims] found that respondents' property had depreciated in value"); *Richards*, 233 U.S. at 549 (finding numerous and specific kinds of damage to plaintiff's house, which caused it to depreciate in value and become unrentable). Nor was it the kind of permanent physical occupation case that this Court finds appropriate to the *per se* takings category – a case which "presents relatively few problems of proof" because the "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Loretto*, 458 U.S. at 419.

As a facial challenge effectively made to the "mere enactment" of the Iowa statute, Respondent's case encountered an "especially steep" hill, *Keystone*, 480 U.S. at 495, and should have been rejected on its merits. The Iowa decision's encroachment on this Court's standard for considering facial challenges should be addressed by this Court, particularly in view of the potentially far-reaching impact that the decision will otherwise have.

5. The writ should be granted, finally, because the Iowa court's decision threatens to undermine the sound and consistent policy of our national government and all 50 of our state governments. Iowa's right-to-farm law, like similar statutes in the other 49 States, was enacted in recognition of "the importance of preserving the state's finite supply of agricultural land" and to stem the "[c]onversion of farmland to urban development, and other nonfarm uses." Iowa Code § 352.1. The statute therefore provides "local citizens and local governments [with] the means by which agricultural land may be protected from nonagricultural development

pressures." *Id.* In view of the friction that can develop between agricultural operations and their residential neighbors over noise, odor, and other normal incidents of farming, a primary means of protecting agricultural lands is the provision of a qualified nuisance defense for lands committed to "agricultural areas." *Id.* § 352.11.

The need to preserve America's farmland has received increased attention from Congress and from state and local lawmakers since the late 1970s. *See, e.g., Preserving America's Farmland — a Goal the Federal Government Should Support*, Report to the Congress by the Comptroller General of the United States (Sept. 20, 1979) ("Report to Congress"); National Agricultural Lands Study, Final Report (jointly sponsored by the United States Department of Agriculture and the President's Council on Environmental Quality, 1981) ("NALS Report"). The realization that millions of acres of prime farmland were being lost to other uses each year, and that this vital resource is essentially non-renewable (since acres converted to development rarely can return to farm use), [10] spurred legislatures nationwide to enact "right-to-farm" laws that, like the Iowa statute, encourage the agricultural use of land by providing a measure of protection from nuisance suits.

The statutory limitation of nuisance suits preserves farmland by protecting farms and farmers from the cost and economic uncertainty that comes with litigation and the threat of litigation over the normal incidents of farm life. As explained by one state legislature:

---

[10] *See* Report to Congress at 5 (estimating 3 to 5 million acres of U.S. farmlands are converted for urban or other uses each year, and noting that farmland converted to more intensive uses will not likely be farmed again).

> When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this [law] to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

N.C. Gen. Stat. § 106-700. *See also* Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. Pitt. L. Rev. 289, 305 (1984) ("In enacting the right-to-farm laws, the various state legislatures have made the policy judgment that the social benefits of retaining land in agriculture are so critical that, rather than allowing courts to decide on a case-by-case basis whether an agricultural use is reasonable, the balance between agriculture and other uses should always be tipped toward agriculture").

The "burden" of providing farmers with a measure of certainty concerning the activities that can subject them to nuisance liability necessarily falls on neighboring landowners who are would-be nuisance plaintiffs. Iowa's statute minimizes that burden by excluding from protection farming activities that are unlawful or negligent, as well as injuries caused prior to the designation of the agricultural area or by pollution, overflowing of land, or excessive soil erosion. *See* Iowa Code § 352.11(1)(b). Other right-to-farm laws include similar exceptions to ensure that only lawful, non-negligent, and responsible farming operations are protected from nuisance suits, thus minimizing the intrusion upon neighboring landowners.

Right-to-farm laws such as Iowa's thus reflect the state legislatures' careful balancing of benefits and burdens within a society facing increasing tensions between the need to maintain agricultural land uses and the pressures of a growing population demanding shopping malls, golf courses, and peaceful home-sites in the "country."[11] These statutes are in this way indistinguishable from innumerable other land use restrictions, which, when challenged as uncompensated takings, plainly call for "essentially ad hoc, factual inquiries" into the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citing *Penn Central*, 438 U.S. at 124). Unlike cases involving such other land use restrictions, however, that factual inquiry was foreclosed here by the Iowa court's ill-conceived and indefinite expansion of the category of *per se* physical takings.

---

[11] *See* NALS Report at 10-11 (describing rapid expansion of residential development in rural areas and demographic and economic pressures leading to conversion of land from agricultural use, including "[t]ensions between farming and nonfarming people ... in rural areas with growing populations" with causes ranging from vandalism of crops and farm equipment to disagreements over taxes for services demanded by new residents).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

JOHN A. MACLEOD
Counsel of Record
STEVEN P. QUARLES
ELLEN B. STEEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Amici Curiae

January 21, 1999